No. 97-7541

APR 13 1998

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

AMANDA MITCHELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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April 1998

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QUESTION PRESENTED

Petitioner pleaded guilty to a non-capital offense. At sentencing, the court imposed a ten-year mandatory minimum term expressly predicated on the adverse inference it drew from her silence with respect to the quantity of drugs "involved" in her conspiracy offense.

Does the Fifth Amendment privilege protect the defendant from an adverse inference being drawn on the basis of her silence at sentencing?

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS files this amicus brief pursuant to this Court's Rule 37.2(a) in support of Amanda Mitchell's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. At the request of the Court, the Solicitor General has been invited, notwithstanding the government's waiver of answer, to respond to the petition. Both petitioner and respondent have granted amicus NACDL consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers (NACDL), is a District of Columbia nonprofit corporation founded 40 years ago, numbering more than 9000 attorneys, including citizens of every state. The NACDL has over 70 state and local affiliates with a combined membership of some 28,000.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL and its members, made any monetary contribution to its preparation or submission.

NACDL is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. One of its particular concerns is the defense of the Fifth Amendment privilege against compulsory self-incrimination, as one of the constitutional provisions which is least understood and appreciated by public opinion, yet which is of the highest value in the preservation of a free society which respects the dignity and autonomy of every individual, including the criminally accused and suspected.

SUMMARY OF ARGUMENT

A criminal defendant who has pleaded guilty retains the right to assert the Fifth Amendment privilege against being compelled to be a witness against herself at sentencing. The Third Circuit erred in affirming an increased sentence that was expressly predicated on drawing an adverse inference from the defendant-petitioner's silence.

The clause applies by its terms to petitioner's failure to deny an allegation of the amount "involv[ed]" under the federal mandatory minimum sentencing law for controlled substance conspiracies. Sentencing occurs "in a criminal case," and when the court draws an adverse inference from silence, it is imposing compulsion "to be a witness."

Information that increases a defendant's sentence is used "against" her. The Amendment itself does not demand that there also be any risk of "self-incrimination" on the substance of the charges.

Even if the Fifth Amendment privilege protects only against a real and substantial risk of self-incrimination, the privilege was not inapplicable on the basis that petitioner had pleaded guilty. She had not waived her right to appeal, and at sentencing her conviction was not yet final. Her answers to the judge's questions could also have incriminated her on several criminal charges beyond those to which she had pleaded guilty.

The circuits are divided on the applicability of the Fifth Amendment privilege in these circumstances, and the decision below is inconsistent with this Court's cases. The petition for certiorari should be granted; the judgment below must be reversed.

REASONS FOR GRANTING THE WRIT

The question presented is of exceptional importance in the administration of federal criminal justice, and the Third Circuit's opinion is inconsistent with this Court's precedent and decisions of other circuits.

Petitioner Mitchell pleaded guilty to all counts against her in the indictment but asserted a right not to provide information that could subject her to increased punishment in either this case or in another, later prosecution. The sentencing court held that this refusal warranted an adverse inference that tipped the balance to satisfy the government's burden of establishing that the extent of her conduct created liability for a conspiracy "involving" more than five kilograms of cocaine, resulting in the imposition

of a mandatory minimum ten year term. 21 U.S.C. § 841(b)(1)(A). The Third Circuit affirmed on the basis that the Fifth Amendment's privilege against compulsory self-incrimination does not apply at sentencing following a guilty plea. Pet. Appx.; 122 F.3d 185. This Court should grant review and reverse that judgment and opinion.

The decision of the court below erroneously resolves a constitutional question of major institutional significance. Over 90% of federal criminal defendants whose cases are not dismissed plead guilty. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 1996*, at 448 (24th ed., U.S. Dept. of Justice, 1997) (table 5.27).[2] In the vast majority of federal cases, sentencing is the most important issue. Conduct for which the defendant has not been convicted can add years to her punishment in the most routine of cases. USSG § 1B1.3 ("relevant conduct" rule); see United States v. Watts, 529 U.S. --, 136 L.Ed.2d 554 (1997) (per curiam); United States v. Witte, 515 U.S. 389 (1995). Here, it resulted in the imposition of a mandatory minimum ten year term. Because the "Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,'" Estelle v. Smith, 451 U.S. 454, 468 (1981) (quoting Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)), the defendant must have a right to remain silent without penalty at sentencing.

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[2] Of 60,255 total federal defendants in 1996, 7083 had their cases dismissed. Of the remaining 53,172 defendants, 48,196 (90.6%) pleaded guilty or nolo contendere. Thus, in total, 80% of cases ended in guilty pleas (48,196/60,255); of all those convicted, 92% were convicted by plea. Id.

In Estelle v. Smith, this Court considered statement made during a court-ordered competency evaluation. Th psychiatrist's observations were later used in support of th state's claim for a death penalty. This Court held the statements inadmissible under the Fifth Amendment in the absence of the warnings mandated by Miranda v. Arizona, 384 U.S. 436 (1966). Smith, 451 U.S. at 461-69.[3]

The majority of this Court in Smith reaffirmed its long-held position:

> that 'the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.'

451 U.S. at 462-63 (citations omitted).[4] Nothing in the Court's rationale suggests any basis to limit that decision

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[3] The Court also held that the Sixth Amendment required in this context that defense counsel be notified in advance of the planned interview. 451 U.S. at 469-72. Then-Justice Rehnquist concurred in the judgment on Sixth Amendment grounds but disagreed with respect to the applicability of the Fifth Amendment to punishment issues. 451 U.S. at 747-76. No other Justice joined in that position, which the court below effectively adopted, albeit without even citing Estelle v. Smith.

[4] The Court reserved decision on the question whether, in other contexts, Miranda warnings are always required when a convicted defendant is interviewed in custody to obtain information for sentencing. Smith, 451 U.S. at 469 n.13. In that reservation, the Court did not intimate doubt about the applicability vel non of the Fifth

to capital proceedings, nor does anything in the text or the purpose of the Fifth Amendment's self-incrimination clause. Cf. Delo v. Lashley, 507 U.S. 272, 286 n.7 (1993); Gardner v. Florida, 430 U.S. 349, 357-60 (1977) (plurality). See also Roberts v. United States, 445 U.S. 552, 559-61 (1980) (rejecting claim that defendant could remain silent at sentencing without penalty on sole basis that constitutional privilege was not contemporaneously invoked; no Justice suggested Fifth Amendment was inapplicable).

The question presented in this case is worthy of consideration by this Court on certiorari. The application of the Fifth Amendment privilege at non-capital sentencings was presented for consideration in a case granted review for decision in the 1992 Term, only to have the writ dismissed after argument as improvidently granted. See Montana v. Imlay, 506 U.S. 5 (1992) (per curiam).[5] Justice White urged the Court to take a federal case presenting another manifestation of the issue for consideration that year. See Kinder v. United States, 504 U.S. 946 (1992) (opinion dissenting from denial of certiorari).[6]

Commentators immediately noticed that the Third Circuit's opinion in this case:

> marked a dramatic departure from the overwhelming weight of case law. Every other circuit that has ruled on this issue has decided that a defendant retains her Fifth Amendment privilege if her testimony could be used to increase her sentence.

Recent Cases, 111 Harv.L.Rev. 1140, 1142 (1998) (noting and sharply criticizing decision below).[7] Concurring in the judgment, Judge Michel, sitting by designation, recognized that the decision in this case "create[s] an apparent split among Circuits." 122 F.3d at 192. Judges Becker, Scirica, Mansmann and Nygaard voted for rehearing in banc. Pet. Appx.

Not only is petitioner Mitchell's Fifth Amendment claim important and her position consistent with precedent, but it is also supported by the language and principles of the Fifth Amendment privilege against compul-

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(footnote continued)

Amendment privilege at the sentencing stage of a "criminal case"; the concern was with such Miranda-related matters as "custody" and "interrogation."

[5] In Imlay, the Court was set to decide "whether the Fifth Amendment bars a State from conditioning probation upon the probationer's successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts." 506 U.S. 5 (White, J., dissenting).

[6] The question presented in Kinder was whether the "acceptance of responsibility" sentencing guideline, USSG § 3E1.1, violated the Fifth Amendment privilege, to the extent that (prior to amendment in 1992) it required the defendant to acknowledge guilt for "relevant conduct" beyond the offense of conviction. USSG appx. C, amend. 459.

[7] The Harvard Note counts seven circuits to the contrary of the court below, along with "[m]ost state courts." 111 Harv.L.Rev. at 1142-43 n.32.

sory self-incrimination.[8] For these reasons, the writ should be granted.

1. The Plain Language of the Fifth Amendment Applies Between Conviction and Sentencing Without Regard to the Risk of Incrimination for Other Offenses.

The Fifth Amendment protects every "person" against being "compelled in any criminal case to be a witness against himself." If the defendant must choose between testifying and facing greater punishment, there is Fifth Amendment compulsion. The court below professed that it could "see nothing in the Fifth Amendment ... that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction." 122 F.3d at 191. But under the plain language of the amendment, "self-incrimination" is not the sole test. To the contrary, that phrase does not

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[8] Although this case arises out of a federal criminal prosecution, it does not seem possible for this Court to avoid the constitutional question on statutory grounds. The question whether the defendant may, without adverse inference, remain silent at sentencing is not addressed in Fed.R.Crim.P. 32 or in the United States Sentencing Guidelines' procedural provisions (see USSG ch. 6.A.), nor is it addressed by 18 U.S.C. § 3481 ("In trial of all persons charged with the commission of offenses against the United States ..., the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.") (emphasis added); see generally Bruno v. United States, 308 U.S. 287 (1939).

even appear in the Clause itself; it is shorthand for an extension of the Amendment's literal protection. The core guarantee of the Fifth Amendment privilege is against being compelled "in a criminal case" to "be a witness against" oneself. Counselman v. Hitchcock, 142 U.S. at 562.

Sentencing surely occurs "in" the "criminal case," and the adverse inference applied against petitioner Mitchell compelled her to "be a witness against" herself at that proceeding. See Griffin v. California, 380 U.S. 609 (1965); see also James v. Kentucky, 466 U.S. 341, 344 (1984) ("to effectuate the right to remain silent, a trial judge must instruct the jury not to draw an adverse inference from the defendant's failure to testify if requested to do so"); Carter v. Kentucky, 450 U.S. 288 (1981). Sentencing judges, like juries, are bound to reject the unconstitutional inference.

Under the Third Circuit's holding there is nothing to stop a prosecutor from calling the defendant to the witness stand at sentencing and moving for contempt if she refuses to answer punishment-enhancing questions, or even of calling the defendant before a grand jury after conviction and prior to sentencing. Such possibilities are inconsistent with the constitutional privilege. See Sara S. Beale, Wm. C. Bryson, et al., 1 Grand Jury Law and Practice § 6:10, at 6-80 (2d ed. 1997) (citing 3 circuits and 6 states); Grand Jury Project, 1 Representation of Witnesses Before Federal Grand Juries § 8.5(e), at 8-19 (3d ed. R.J. Klieman rev. 1998).

The decision below would also compel a defendant's response to every inquiry of a U.S. Probation Officer in the presentence investigation, since there would be no privilege to withhold sentence-increasing

responses. Compare Jones v. Cardwell, 686 F.2d 754 (9th Cir. 1982) (Fifth Amendment applies to presentence investigation interview of detained convict)[9]; accord, United States v. Miller, 910 F.2d 1321, 1332 (6th Cir. 1990) (Merritt, C.J., dissenting), cert. denied, 498 U.S. 1094 (1991); cf. United States v. Cortes, 922 F.2d 123, 126 (2d Cir. 1990) (rationale of contrary cases not "altogether persuasive").

The broader protection against "self-incrimination" that courts have fashioned to enforce the Fifth Amendment privilege explains why the right can also be invoked in any case, civil or criminal, when the potentially incriminating answers could be used against the witness in a future criminal case. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).[10] But in the criminal case itself, the defendant cannot even be called to the stand by the prosecutor, regardless of the nature of the questions to be asked, without literally violating the privilege against being made "a witness against himself" that applies "in a criminal case."[11] That core protection -- the right of a criminal defendant to remain entirely silent and entirely absent from the witness stand in his or her own case -- is ignored by the decision below.

2. A Guilty-Pleading Defendant Is Not Differently Situated from a Defendant Who Has Gone to Trial with Respect to Fifth Amendment Rights at Sentencing.

The right of any person to claim the Fifth Amendment privilege with respect to the instant offense should be held to apply until the "criminal case" terminates, that is, when the conviction becomes final. Thus, at least

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[9] Without deciding the Miranda issue, id. at 757 n.2, the Jones court granted habeas relief to a defendant who had been ordered by the court to attend, cooperate and follow instructions in the presentence interview.

[10] See also Baxter v. Palmigiano, 425 U.S. 308, 316-20 (1976) (Fifth Amendment claim available to prisoner in disciplinary proceeding, but adverse inference may be drawn); Garner v. United States, 424 U.S. 648, 658 (1976) (privilege may be claimed in response to question on tax return, but is waived if not invoked); United States v. Kordel, 397 U.S. 1 (1970) (available to civil litigant responding to interrogatories, but must be invoked); Arndstein v. McCarthy, 254 U.S. 71 (1920) (available to debtor in bankruptcy; dismissal of imprisoned contemnor's habeas corpus petition reversed), clarified on denial of mtn. for interv. & rearg., 254 U.S. 379 (1920).

[11] By its text, the Fifth Amendment privilege against being compelled to be a witness against oneself "in any criminal case" applies fully at sentencing, regardless of whether the convicted defendant is then still an "accused" facing a "criminal prosecution" under the Sixth Amendment. Cf. Williams v. New York, 337 U.S. 241 (1949) (due process clause does not require confrontation of witnesses, so as to preclude use of hearsay brought in through probation report at capital sentencing). This Court's most recent Fifth Amendment pronouncement does not bolster the holding of the court below. Ohio Adult Parole Auth. v. Woodard, 1998 U.S.Lexis 2130 (March 25, 1998) (No. 96-1769), involved a clemency application -- a nonjudicial, post-conviction process that is presumably no longer "in [the] criminal case." There, the Court permitted an adverse inference from the applicant's refusal to be interviewed. Cf. Baxter v. Palmigiano, supra.

while the right of direct appeal remains available, the privilege survives.[12] The leading treatises agree. E.g., 1 McCormick on Evidence § 121, at 440 (4th ed. J.W. Strong 1992); see also Annot. (Soeffing), "Plea of guilty or conviction as resulting in loss of privilege against self-incrimination as to crime in question," 9 A.L.R.3d 990 (1966 & 1996 Supp.). Under the Fifth Amendment, a defendant who has pleaded guilty but has not yet been sentenced is not situated any differently from one who has stood trial and may appeal for a retrial.

The court below cited Reina v. United States, 364 U.S. 507, 513 (1960), see 122 F.3d at 189, but that case is entirely inapposite. The petitioner there refused to testify before a grand jury after he had been convicted and sentenced, and had begun to serve the term imposed. The Court held his refusal to answer questions about his offense could be valid in relation to potential state charges, but that this risk had been removed by a grant of immunity.

Even when the defendant has pleaded guilty, as here, a right of appeal remains, which may sometimes lead to a trial. If the defendant has not moved to withdraw her plea before sentencing under Fed.R. Crim.P. 32(e), from which denial an appeal could arise, she may nevertheless appeal on the basis of substantial defects in the Rule 11 colloquy, see McCarthy v. United States, 394 U.S. 459 (1969), or to challenge the factual basis for the plea, see North Carolina v. Alford, 400 U.S. 25 (1970), or to claim a breach of a plea agreement. See Santobello v. New York, 404 U.S. 257 (1971). Any of these appeals may lead to vacatur of the plea and a trial on the underlying charge. Until the appeal terminates or the time to take a direct appeal expires, the defendant must be permitted to remain silent with respect to the underlying charges in the case.

The Fifth Amendment privilege is not forfeited, as to all matters related to the crime of conviction, by the mere fact of the plea itself. A "waiver" of the privilege by testifying on a certain subject is binding only during the same "proceeding," meaning that particular stage of the case. See Annot. (DiSabatino), "Right of witness in federal court to claim privilege against self-incrimination after giving sworn evidence on same matter in other proceedings," 42 A.L.R.Fed. 793 (1979). See generally Brown v. United States, 356 U.S. 148 (1958) (defendant may not testify in own defense but decline to be cross-

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[12] A judgment of conviction "becomes final" on the date that direct appellate review, including certiorari to this Court, is completed, or the time to seek that review expires. See Caspari v. Bohlen, 510 U.S. 383, 390-91 (1994); Graham v. Collins, 506 U.S. 461, 467-68 (1993); Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987); Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986) (per curiam). And even if a line could be drawn earlier than the termination of the appellate process, it should at least be clear that during the sentencing proceedings, a conviction, whether by plea or verdict, is not final. Indeed, it could be argued that a risk of self-incrimination exists until the conviction is beyond conventional challenge. Cf. 28 U.S.C. § 2255 (one-year statute of limitations after finality to bring motion to vacate).

examined in reliance on Fifth Amendment).[13]

When the courts say that a defendant waives his or her rights under the Fifth Amendment by pleading guilty, they mean only that the defendant may choose not to plead guilty, and instead may stand on the right to remain silent and put the government to its proof of the elements; in other words, that the defendant may refuse to change her plea. See, e.g., Parke v. Raley, 506 U.S. 20 (1992); Boykin v. Alabama, 395 U.S. 238 (1969). That dictum does not mean that the guilty-pleading defendant no longer has any Fifth Amendment rights in relation to the general subject matter of the offenses of conviction. Nor does it mean that at a later stage, such as sentencing, the waiver implicit in the change of plea itself still obtains. See Recent Cases, 111 Harv.L.Rev. at 1143-44.

The use of an adverse inference to tip the balance against petitioner in the computation of drug quantities necessary to trigger a mandatory-minimum sentence (or to establish "relevant conduct" justifying an increased guideline sentence) was unconstitutional.

3. Petitioner, Like Virtually Every Federal Defendant, Risked Self-Incrimination at Sentencing on Numerous Other Offenses.

Apart from the validity of petitioner Mitchell's claim of a Fifth Amendment privilege at sentencing with respect to the offense of conviction, her claim should have been sustained in view of the sundry other crimes for which she could still be prosecuted. The court below was mistaken in distinguishing this case from others on the basis that "Mitchell does not claim that she could be implicated in other crimes by testifying at her sentencing hearing." 122 F.3d at 191. She had no burden to make that claim. Whenever the risk of self-incrimination is apparent, a court must sustain the privilege claim. Malloy v. Hogan, 378 U.S. 1, 14 (1964), quoting Hoffman v. United States, 341 U.S. 479, 486 (1951).

In Hoffman, this Court ruled that a witness may not be required to answer after claiming a Fifth Amendment privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] cannot possibly have such tendency to incriminate." 341 U.S. at 488. The self-incrimination privilege "must be accorded liberal construction in favor of the right it was intended to serve." Id. at 486. The decision below ignored the established precept that while the debtor or witness bears the burden of claiming the privilege, only in the atypical situation where it is not evident from the questions and their context where the potential for self-incrimination may lie should the court demand that the witness proffer the basis for the constitutional claim.[14] Even then, under Hoffman, the claimant does not bear the ultimate burden of establishing the claim of privilege.

Here, the basis for petitioner's claim, as to additional offenses, was perfectly evident. Her penalized

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[13] In addition, "[d]isclosure of a fact waives the privilege as to details." Rogers v. United States, 340 U.S. 367, 373 (1951).

[14] Only a mere unexplained statement that the information sought would or could tend to incriminate the witness may be held insufficient. Hoffman, supra.

silence concerned drug transactions deemed "relevant conduct" under USSG § 1B1.3. To qualify as "relevant" (at least in the Third Circuit) any additional transaction had to consist of criminal conduct. United States v. Dickler, 64 F.3d 818, 830-31 (3d Cir. 1995). In this case particularly, where the petitioner had pleaded "open" to all counts and there was no plea agreement, the government was free, if it wished, to prosecute her further for any number of other offenses, including particular transactions in furtherance of the same conspiracy that were the very basis for the "relevant conduct" determination.[15] As petitioner cogently explains, Pet. at 14-15, at the time of her sentencing, in July 1996, she faced a "real and appreciable" risk[16] of further prosecution on many state or federal charges that might occur to an imaginative prosecutor wandering the pages of our over-criminalized statute books. Indeed, if she has no Fifth Amendment right to remain silent, the government might even choose to seek additional charges in response to a defendant's refusal to provide information between plea and sentencing about her own conduct and that of others. Compare Bordenkircher v. Hayes, 434 U.S. 357, 364-65 (1978), with Blackledge v. Perry, 417 U.S. 21 (1974).

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[15] These transactions were also expressly treated as "involv[ed]" in her instant conspiracy offense so as to trigger a mandatory ten-year term under 21 U.S.C. § 841(b)(1)(A)(ii)(II).

[16] Marchetti v. United States, 390 U.S. 39, 48 (1968), quoting Brown v. Walker, 161 U.S. 591, 599 (1896) (in turn quoting British case law).

If a court is convinced that a question cannot possibly involve self-incrimination, the witness can be compelled to testify. Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 478 (1972).[17] On the other hand, neither the absence of a current investigation or charge, nor informal assurances of police or prosecutorial authorities concerning a lack of present intention to prosecute, will suffice to overcome a claim of privilege; it is enough that the defendant have reasonable cause to apprehend danger of prosecution as a result of the disclosures. Hoffman, 341 U.S. at 486. The casual dismissal of petitioner's claim by the court below stands in stark contrast to this Court's standard.[18]

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[17] For example, the statute of limitations may have run on that offense, or the claimant may already enjoy double jeopardy protection from prosecution, or the claim may involve potential incrimination under the laws of a foreign jurisdiction with which there is no extradition treaty. See Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1065-66 (3d Cir.) (hypothetical possibility of extrajudicial kidnaping insufficient), aff'd on other grnds., 493 U.S. 400 (1990). In Zicarelli, the Court found that although the witness might reasonably fear a foreign prosecution generally, there was no logical connection between that risk and the questions he had refused to answer in New Jersey. See United States v. Balsys, 119 F.3d 122 (2d Cir. 1997), cert. granted, 118 S.Ct. 751 (1998) (No. 97-873).

[18] In none of this Court's cases is the existence of a current criminal investigation said to be a requirement for a Fifth Amendment claim. In fact, the cases say the opposite. See, e.g., Minnesota v. Murphy, 465 U.S. 420,

For all these reasons, as well as those discussed in the petition itself,[19] the petition for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, to address the important question presented, to resolve a split in the Circuits, and to correct manifest constitutional error, this Court should grant the writ of certiorari. After full briefing and argument, this Court should reverse the judgment of the United States Court of Appeals for the Third Circuit and remand the case with directions to allow petitioner a resentencing.

Respectfully submitted,

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Dated: April 10, 1998

_____(footnote continued)

435 (1984) ("answers that would incriminate him in a pending or later criminal prosecution") (emphasis added); Maness v. Meyers, 341 U.S. 479, 462 (1975).

[19] Amici specifically commends to this Court's attention the petitioner's demonstration of a split in the circuits on the issue presented here. Petition, at 17-19; see also note 7 supra.